LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
OCT 31 1963
JOHN F. DAVIS, CLERK

No. 26

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

EXCHANGE PARTS COMPANY, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Brief For Respondent

JEAN ALLARD
Chicago, Illinois
HAROLD R. MUELLER
KARL H. MUELLER
Fort Worth, Texas
Attorneys for Respondent

JEAN ALLARD
Marmont Corporation
168 North Michigan Ave.
Chicago 1, Illinois
MUELLER & MUELLER
Burk Burnett Building
Fort Worth, Texas
Of Counsel

Fort Worth Brief Printing Co., 610 E. Jamison Street Phone ED 2-4970

INDEX

	Page
Opinion Below	1
Question Presented	1
Statement	2
I. Proceedings Before the Board	2
II. The Facts	5
A. Background	5
B. The change in the time for taking vacations	6
C. Restoration and reiteration of overtime policy	8
D. The pre-election campaign	9
III. The Decision of the Court of Appeals	11
Summary of Argument	12
Argument	13
Conclusion	29

AUTHORITIES CITED

Cases: Page

Bonwit Teller, Inc. v. N.L.R.B., 197 F. 2d 640 (C.A. 2; 1952) cert. den. 345 U.S. 905 17

Collins Baking Co. v. N.L.R.B., 193 F 2d 483 (C.A. 5; 1951) 25

Indiana Metal Products Corp. v. N.L.R.B., 202 L ed 613 (C.A. 7; 1953) 16

Joy Silk Mills v. N.L.R.B., 185 F 2d 732 (C.A.D.C.; 1950) Cert. Den., 341 U.S. 915 16

May Department Stores Co. v. N.L.R.B., 326 U.S. 376, 90 L ed 145, 66 S. Ct. 203 ..... 16, 27, 28

Medo Photo Supply Corp. v. National Labor Relations Board, 321 U.S. 678, 88 L ed 1007 (1944) 15

N.L.R.B. v. Bailey Co., 180 F 2d 278 (C.A. 6; 1950) 16, 25

N.L.R.B. v. Cleveland Trust Co., 214 F 2d 95 (C.A. 6; 1954) 17

N.L.R.B. v. Crompton-Highland Mills, Inc., 337 U.S. 217, 93 L ed 1320, 69 S. Ct. 960 16

N.L.R.B. v. Crown Can Co., 138 F 2d 263 (C.A. 8; 1943) 16

N.L.R.B. v. Economy Furniture Co., 284 F 2d 339 (C.A. 5; 1960) 25

N.L.R.B. v. Erie Resistor Corp., 373 U.S. 221, 10 L ed 2d 308 (1963) 17

N.L.R.B. v. Ferguson, 257 F 2d 88 (C.A. 5; 1958) 25

N.L.R.B. v. Gate City Cotton Mills, 167 F 2d 647 (C.A. 5; 1948) 16, 25

N.L.R.B. v. W. T. Grant Co., 208 F 2d 710 (C.A. 4; 1953) 17

N.L.R.B. v. Katz, ... U.S. ...., 8 L ed 2d 230 (1962) 16

N.L.R.B. v. Lowell Sun Publishing Co., 320 F 2d 835 (C.A. 1; 1963) 16

N.L.R.B. v. The Newton Co., 236 F 2d 438 (C.A. 5; 1956) 17

N.L.R.B. v. Pyne Molding Corp., 226 F 2d 818 (C.A. 2; 1955) 16

N.L.R.B. v. West Coast Casket Co., 205 F 2d 902 (C.A. 9; 1953) 16

Rapid Roller Co. v. N.L.R.B., 126 F 2d 452 (C.A. 7; 1942) 25

Republic Aviation Corp. v. National Labor Relations Board, 324 U.S. 793, 798 20

AUTHORITIES CITED (Continued)

Cases: Page

M. H. Ritzwoller Co. v. N.L.R.B., 114 F 2d 432 (C.A. 7; 1940) 16

Peter J. Schweitzer, Inc. v. N.L.R.B., 144 F 2d 520 (C.A. D.C.; 1944) 27

Western Cartridge Co. v. N.L.R.B., 134 F 2d 240 (C.A. 7; 1943) 25, 26

Board Decisions:

American Freightways, Inc., 124 N.L.R.B. 146 (1959) 18, 19

Bailey Company, 75 N.L.R.B. 941 25
Bonwit Teller, Inc., 96 N.L.R.B. 608 17

Cleveland Trust Co., 102 N.L.R.B. 1497 17
Cosco Products Company, 123 N.L.R.B. 766 16

Dal-Tex Optical Company, Inc., 136 N.L.R.B. 1782, 1786-1787 (1962) 22

Fetzer Television, Inc., 129 N.L.R.B. 660 (1960) 19

W. T. Grant Co., 104 N.L.R.B. 338 17

Hudson Hosiery Company, 72 N.L.R.B. 1434 19

Indiana Metal Products Corp., 100 N.L.R.B. 1040 16

Lowell Sun Publishing Co., 136 N.L.R.B. 206 (1962) 16

Nickey Chevrolet Sales, Inc., 142 N.L.R.B. No. 4, 63-1 CCH NLRB ¶ 12,292 (April 10, 1963) 16, 19

Pyne Molding Corp., 110 N.L.R.B. 1700 16

Reliance Fuel Oil Corp., 129 N.L.R.B. 1166 (1961) 16, 19

The Newton Co., 112 N.L.R.B. 465 17
True Temper Corp., 127 N.L.R.B. 839 ..... 18, 19

Willard's Shop Rite Markets, Inc., 132 N.L.R.B. 1146 (1961) 16, 19, 22

No. 26

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

EXCHANGE PARTS COMPANY, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Brief For Respondent

Opinion Below

The opinion of the Court of Appeals (R. 115-129) is reported at 304 F. 2d 368. The Board's decision adopting the Examiner's report (R. 20-34) and its order (R. 52-54) are reported at 131 N.L.R.B. 806.

Question Presented

Respondent respectfully submits that the question presented is the following:

> Whether standing alone and unconditionally a change in the time for taking vacations, the restoration of a pre-existing policy concerning overtime in respect to holidays and the announcement thereof in face of a union organizing campaign and forthcoming representation election constitute a violation of employee rights under the National Labor Relations Act, as amended.

Statement

I

Proceedings Before the Board

On November 9, 1959, the union (International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO) wrote respondent that it was engaged in organizational work in respondent's plant, and that it represented a majority of respondent's employees (R. 68-69, 99). This was the first respondent knew about any organizational activity among its employees (R. 68-69, 88). The statement in the Board's brief (at page 2) that the union began its organizational campaign on or about October 26 was not found as a fact by the Examiner or the Board and is completely wanting in evidentiary support.

On November 16, 1959, the union filed a representation petition (Case 16-RC-2637) in connection with which a hearing was held December 29 (R. 57). On February 19, 1960, the Board issued its decision and direction of election pursuant to which an election was held March 18 which the union lost (R. 59). Thereafter the union filed objections setting out conduct allegedly affecting the results of the election in respect to some of which the Board ordered a hearing (R. 16-18).

The union also filed an unfair labor practice charge against respondent (Case No. 16-CA-1357) in which it alleged a discriminatory discharge and "other acts and conduct" (R. 7-9). A complaint issued charging respondent with having violated the Act by

(a) On or about February 13, 1960, placing in effect a change in scheduling vacations so as to permit employees to obtain an additional week-end during their vacation period,

(b) On or about February 25, 1960, announcing an additional holiday, and

(c) On or about March 4, 1960, announcing and placing in effect a change in computing overtime pay during a week in which a paid holiday fell which resulted in financial benefit to the employees (R. 11-13).

The hearing on this complaint was consolidated with the hearing on the union's objections in the representation proceeding (R. 15-16). Only two witnesses testified, C. V. McDonald, respondent's vice-president and general manager and an employee named Townley (R. 22).

The Examiner who heard these matters issued his report on February 2, 1961, (R. 20-34) in which he recommended that the union's objections concerning the election be overruled excepting the one dealing with the granting of economic benefits (R. 28-30). The Examiner noted in respect to the complaint that "In essence the General Counsel contends that the granting and timing of the announcements of these benefits during the union campaign and pending an election, irrespective of motive, constitutes a violation of the Act" (R. 25). The complaint made no reference to the organizing campaign or pending election and contained no allegation that the purpose of the conduct

complained of was to interfere with such campaign or election (R. 11-13, 36-37, 57). The Examiner disposed of respondent's contention and supporting evidence that it was not motivated by any unlawful considerations by holding that "* * * motive is neither controlling nor material" and cited as his sole authority the Board's decision in *American Freightways, Inc.*, 124 N.L.R.B. 146 (R. 27-28).

The Examiner concluded that respondent violated the Act by granting a sixth holiday, changing the time for taking vacations, treating paid holidays as time worked in computing overtime pay and by the announcement thereof (R. 29-34).

The decision of the Board issued May 26, 1961, simply adopted the Examiner's report without change (R. 52-55). The Board made no independent findings or conclusions.

On March 2, 1961, the union filed a motion to withdraw its objections concerning the 1960 election and to withdraw its 1959 representation petition (Case No. 16-RC-2637) (R. 34). The Board granted the motion by order dated March 23, 1961 (R. 51) and the representation proceeding thereupon was closed.

II

The Facts

This part of the statement of the case will be confined to the change in the time for taking vacations and the restoration and reiteration of the overtime policy relative to paid holidays. The matter of the added or sixth holiday is not before the court.[1]

A. Background

On November 4, 1959, without knowledge of any union activity, if, in fact, any existed, respondent issued a letter to each employee stating that its officials had recently returned from an industry conference at which "a great deal of emphasis was placed on *employee welfare*" (R. 68-71, 87, 101-103). It was pointed out that respondent had provided increased employee benefits—"a wonderful insurance program * * * more paid vacations * * *, more paid holidays each year, lunchroom facilities, free medical examinations, free flu shots, coffee breaks and a constantly increasing Xmas bonus". Yet, respondent said it was not satisfied and wanted to do more. To that end and to learn what else respondent could do, it engaged a firm of personnel consultants to make a survey the results of which would be considered "next Saturday" (November 7) and problems corrected. It was also

[1] The Board noted in its brief (at page 3, footnote 1) that the Court of Appeals held the evidence insufficient to support the Board's finding concerning the added holiday and that "the correctness of its ruling in this regard is not in issue here". Also at page 6, footnote 5, it is pointed out that the Court rejected the Examiner's finding that the timing of the birthday holiday announcement was unlawful and that "its ruling on this point was not questioned in the petition for certiorari".

pointed out that for the past six months respondent had been working on a *wage incentive* program which respondent wanted to discuss with the departmental representatives chosen by the employees (R. 101-103).

By another communication of the same date the employees and their wives were invited to a dinner meeting at the plant on November 4 and 5 (R. 69-70, 103-104). It was at these meetings that the addition of the sixth holiday was announced for 1960 (R. 68, 71-72).

There is no evidence that respondent took any further action in respect to its wage incentive program or its meetings with departmental employee representatives after receiving the union's November 9 letter.

B. The change in the time for taking vacations

The regular work week was extended in 1959 to 49½ hours in 5½ days beginning on Monday and ending at noon on Saturday. The week for payroll purposes ended on Thursday and the next day, Friday, was payday. The burden on the accounting department was such that about the first of the year 1960 respondent decided the payroll week should end on Wednesday in order to give more time in which to prepare the checks for the usual Friday payday. This was done and the employees were so notified by bulletin dated January 5, 1960 (R. 62-63, 79-81, 111).

Up to the time of this change the vacation week coincided with the payroll week (R. 62, 81). Employees entitled to a week of vacation left work at the end of their work assignment on Thursday and

returned to work on the second Friday thereafter (R. 62, 81). When the payroll week was changed instead of leaving the vacation week as it had been which then would coincide with neither the work week nor payroll week, respondent changed it so as to coincide with the workweek (R. 82). After the change employees completed their work week on Saturday and returned from a week of vacation on the second Monday following. The amount of the vacation allowance and vacation pay remained exactly the same (R. 81-82). The change was not conditioned in any way upon the employees conduct in respect to self organization or the results of the election.

The complaint alleged that this change was made February 13, 1960, (R. 12) which was prior to the issuance of the Board's direction of election on February 19 (R. 57). An employee left work on February 13, 1960, to go on vacation under the new schedule (R. 82-84, 89, 113-114).

There is no question about the lawfulness or propriety of respondent changing its payroll week. The Examiner, with Board approval, found that the resulting change in the time for taking vacations was an economic benefit to the employees because it enabled them to combine their usual unpaid for weekend with their ensuing vacation work week. As such it was held to be unlawful in face of the union's organizing campaign and the pendency of the representation petition (R. 27-28). The petition was pending for a little more than sixteen months—from November 16, 1959, until March 23, 1961.

C. Restoration and reiteration of overtime policy

In 1959 respondent issued a bulletin to employees announcing that the entire plant and warehouse would be closed Saturday, July 4th, in observance of Independence Day and that "In accordance with Company policy, employees will be paid 4½ hours for this holiday, regular time or overtime, in accordance with hours worked * * *" (R. 61-62, 67, 85, 99).

Previously a holiday had not been treated as time worked in computing weekly overtime. On the basis of an extended work week, i.e., in excess of 40 hours, this resulted in less overtime premium pay in a week in which a holiday fell. Respondent did not intend this result and issued the bulletin to correct it (R. 61, 85).

After Christmas in 1959, and prior to the representation hearing on December 29, it came to respondent's attention that the accounting department had not carried out the policy after the July 4 holiday (R. 61, 63, 85-86). Respondent determined then to give effect to it in the future (R. 86).

The Examiner held that this determination by respondent in December 1959 to give effect to the overtime policy that it made, expressed and followed in connection with the July 4th holiday in 1959 and the listing thereof in an outline of employee benefits sent to employees with a letter dated March 4, 1960, was violative of the employees' rights under the Act (R. 26-28).

Neither the determination to follow such policy, nor the listing of it as a benefit was in any way condi-

tioned or dependent upon the employees' conduct in the exercise of their rights under the Act or upon the outcome of the election.

D. The pre-election campaign

The union addressed several communications to respondent's employees in an effort to sell them on taking membership and designating the union to represent them for purposes of collective bargaining. As a part of its sales campaign the union held out the promise of increased wages, additional benefits, job security and so forth. The union charged respondent with being dishonest, with having a new found interest in the employees because of its fear of the union, with threatening employees and with trying to buy their vote "ever since the Union started organizing" (R. 78-79, 106-110).

In advance of an employee meeting on February 25, 1960, (which was scheduled prior to the issuance of the Board's direction of election R. 76-77) the union addressed letters to the employees in which it predicted that in an effort to buy their vote respondent would offer them "possibly two more paid holidays" and "twenty-five cents per hour increase in wages". It was predicted in connection with the wage increase that "he (respondent's vice-president and general manager) will no doubt tell you that you will receive this increase after you have voted the Union out of the picture, (the bribe tactics)". Added to this prediction was the statement, "You are going to get your wage increase, and it is going to go through a Bargaining Committee selected by you, the employees, and

REMEMBER ONE THING, anything he can promise now in his confused desperation to win votes can no doubt be doubled at the bargaining table" (R. 108-109).

At the February 25 meeting respondent's vice-president told the employees that the union organizer had misrepresented the facts about the things respondent had done for its employees in the past. He reviewed the improvements and changes that were made when there was no threat of a union (R. 60).

On March 4, 1960, respondent sent employees a statement entitled "Facts You Should Know About Your Benefits at EPCO", which began:

> " 'Brother' Tison (the union's organizer) would have you believe that all the things that EPCO does for you are done for one purpose—to buy your vote at the Labor Board election March 18th. He would have you believe that before his boilermakers, iron shipbuilders, blacksmiths and forgers union started trying to organize this automotive parts rebuilding plant you folks did not have any benefits! He would have you believe that before he arrived your Company cared nothing for you."

It was then pointed out that the story of benefits furnished by respondent started in 1938 when the Company was founded and that more benefits had been added year by year, long prior to the inception of the union's organizing campaign.

Added and increased benefits were listed for a number of years. Those listed for 1960 included a sixth

paid holiday, "No loss of overtime pay during the week a paid holiday is given. This will mean $5.00 to $6.00 more per employee per holiday", and "Vacation time extended 1½ days" (R. 64, 90-96).

The sixth paid holiday was announced at the meetings on November 4 and 5, 1959, and is not here involved. (Supra page 5)

III

The Decision of the Court of Appeals

The Court of Appeals denied enforcement of the Board's order (R. 115-130).

The court held that the findings and conclusions of the Examiner and the Board in respect to the granting and announcing of the sixth holiday were not supported by the record (R. 118-119). The Board does not here contest that disposition of the matter. (Supra page 5)

As to the holiday overtime pay and vacation period the court accepted the finding that respondent granted those benefits "with an intent to influence the outcome of the representation election" and noted that this "poses squarely the legal question whether such action necessarily constitutes an unfair labor practice as defined and prohibited by 29 U.S.C.A. Sec. 158(a)(1)" (R. 120). After an extended review of authorities the court concluded that such action in the circumstances of the case was not violative of the Act. "Summarizing", the court said, "the critical fact in this case is that the benefits carried no coercive ele-

ment; they were not conditioned upon the employee's relinquishment of any rights. The employees had, as the Act intended the employees to have, an unfettered right of self-organization, a free choice" (R. 128).

Summary of Argument

The change in respect to vacation schedules and overtime and the announcement thereof were not unlawful in the circumstances here present. This case differs tellingly from the cases on which the Board relies.

The Act did not require that the employees be deprived of those benefits because of the union's efforts to obtain from them the right to represent them in collective bargaining.

There was no obligation to bargain. The changes were not made in consideration of or conditioned in any way upon the relinquishment of any rights by the employees or upon the outcome of the representation election and there was no such relinquishment. The changes were not accompanied by any unfair labor practices or any "injury" to the employees or to their rights. The employees remained free as before to exercise their rights as they saw fit.

The lawfulness of the changes and the announcement concerning them does not turn on the state of the employer's mind in respect to them. The employer's expressed opposition to the union was not unlawful and did not render the changes or the announcement unlawful.

The effect of the changes and announcement upon

the union and its efforts to solicit from the employees the right to represent them is not a proper consideration in deciding in this case whether or not Section 8(a) (1) was violated.

The judgment and opinion of the Court of Appeals are correct and should be affirmed.

Argument

Respondent rests the argument of its case upon the sound judgment and able opinion of the Court of Appeals and respectfully submits that its judgment should be affirmed.

The Court easily and correctly could have found that the Examiner's inference of unlawful motivation went only to the added holiday and, if considered at all, in connection with the vacation or overtime benefits was lacking in substantial support on the record as a whole.

However, the Court sustained the finding that the vacation and overtime benefits were granted with the intent to influence the employees, and it thereby reached the legal question posed so clearly in this case —whether when unattended by unfair labor practices and in face of a union's organizing campaign and a representation election the right of employees to receive and the right of the employer to grant reasonable and proper benefits permanently and unconditionally turns on the purely subjective test of the employer's state of mind, and whether such grant is unlawful if it can be inferred reasonably that the employer in-

tended thereby to influence the employees in the exercise of their rights under the Act.

Here there was no objective manifestation of such intent other than the timing of the general announcement of the vacation and overtime benefits, the assertion that respondent had granted benefits and improvements consistently through the years when there was no union, and the urging of employees to vote against the union. Unquestionably these expressions constituted a lawful exercise of protected speech and may not be used to impute improper motivation without effectively removing the protection and destroying the freedom vouchsafed by the Act.

If in the circumstances of this case the Act made it unlawful for the employees to receive and respondent to grant the benefits here accorded them, it follows as a realistic and practical matter, that whenever and so long as a union seeks to organize employees they and their employer must mark time in respect to improvements in terms and conditions of employment. Respondent submits that the Court of Appeals was correct in holding that the Act does not permit or require any such anomaly.

It is well established that an employer violates Section 8(a) (1) if he grants economic benefits to his employees in exchange for their agreement to abandon or reject the union. The Court of Appeal was aware of this principle and in agreement with it, but the case at bar is not that kind of case. Here the benefits were granted permanently, unconditionally and unattended

by unfair labor practices leaving the employees as free and unfettered as they were before.

The Board cites and quotes from *Medo Photo Supply v. National Labor Relations Board*, 321 U.S. 678, 88 L ed. 1007 (1944) (Brief pp. 8-9). The employer in that case was under a positive legal duty to bargain exclusively with the union. In complete disregard of that obligation and the union the employer treated directly with employees and granted them a wage increase in return for their promise to repudiate the union they had designated as their representative. Upon those facts the employer was held to have violated Section 8(a) (1) and (5) of the Act.

That case and the one at bar are in no sense analogous. Here there was no obligation to recognize or to bargain with the union for it was engaged only in an effort to obtain memberships and bargaining rights from the employees. Here the benefits accorded were not in consideration of or in any way connected with or contingent upon the employee's conduct in the exercise of their rights under the Act. Respondent did not discuss or negotiate with any employees concerning them. They were given at arms length without any character of deal express or implied. Moreover there was not attendant unlawful conduct on the part of respondent.

The Board has undertaken to generalize the "rule" in *Medo* and to transpose it to the instant case by citing a wide variety of clearly distinguishable cases.[2]

[2]Brief at pages 8 and 9, footnote 6.

The cases in which the employer granted benefits in violation of his duty to bargain collectively, as in *Medo*, are patently inapposite and provide no rule of decision under the facts in the instant case.[3]

The same is true of cases such as *Medo* in which the offer or grant of a wage increase or other benefit was in consideration of or conditioned on the employees withdrawing from the union or voting against it or taking or withholding other action in the exercise of their rights under the Act.[4]

Likewise inapposite are the cases in which the employers were guilty of unfair labor practices that accompanied the benefits or provided the context in which they were granted such as unlawful interrogation, surveillance, threats, promises, discriminatory treatment and discharges,—cases in which the benefits were "one part of an over-all program of interference and restrain by the employer."[5]

---

[3] *N.L.R.B. v. Katz*, ... U.S. ....., 8 L.ed. 2d 230 (1962); *Medo*, Supra; *May Department Stores Co. v. N.L.R.B.*, 326 U.S. 376, 90 L.ed. 145, 66 S. Ct. 203; *N.L.R.B. v. Crompton-Highland Mills, Inc.*, 337 U.S. 217, 93 L.ed. 1320, 69 S. Ct. 960; *Nickey Chevrolet Sales, Inc.*, 142 N.L.R.B. No. 4, 63-1 CCH NLRB ¶ 12,292 (April 10, 1963).

[4] *Joy Silk Mills v. N.L.R.B.*, 185 F. 2d 732, (C.A.D.C.; 1950) cert. den., 341 U.S. 915; *N.L.R.B. v. Bailey Co.*, 180 F. 2d 278 (C.A. 6; 1950); *M. H. Ritzwoller Co. v. N.L.R.B.*, 114 F. 2d 432 (C.A. 7; 1940); *N.L.R.B. v. Gate City Cotton Mills*, 167 F. 2d 647 (C.A. 5; 1948) *Lowell Sun Publishing Co.*, 136 N.L.R.B. 206 (1962); *N.L.R.B. v. Lowell Sun Publishing Co.*, 320 F. 2d 835 (C.A. 1; 1963).

[5] *N.L.R.B. v. Crown Can Co.*, 138 F. 2d 263 (C.A. 8; 1943); *N.L.R.B. v. West Coast Casket Co.*, 205 F. 2d 902 (C.A. 9; 1953); *N.L.R.B. v. Pyne Molding Corp.*, 226 F. 2d 818 (C.A. 2; 1955); *Indiana Metal Products Corp. v. N.L.R.B.*, 202 F. 2d 613 (C.A. 7; 1953); *Cosco Products Company*, 123 N.L.R.B. 766; *Willard's Shop Rite Markets, Inc.*, 132 N.L.R.B. 1146; *Pyne Molding Corp.*, 110 N.L.R.B. 1700; *Indiana Metal Products Corp.*, 100 N.L.R.B. 1040.

Respondent is not in disagreement with the Board's assertion (Brief at pages 12-13) that there are certain kinds of changes in working conditions that inherently contravene the Act. Cited and quoted in this connection is *National Labor Relations Board v. Erie Resistor Corp.*, 373 U.S. 221, 10 L.ed 2d 308 (1963). That case concerned the employer's grant of 20 years added seniority to employees who did not strike and to those who were hired to replace strikers. The employer's contention that this was done in order to continue to operate its business in face of the strike was held not override the inherent discrimination that contravened the Act. The Board concedes that "The benefits in the present case were not of that nature" (page 13 footnote 8). The same is true of the conduct involved. The decision has no proper application. The attempt to separate and transplant certain of the Court's statements from that case fails because they cannot take root in the facts of this case.

The Act does not prohibit the granting of benefits to employees in face of a union's organizing campaign and a representation election. The courts have recognized that grants in these circumstances on account of business or other legitimate considerations are not unlawful.[6]

[6] *N.L.R.B. v. W. T. Grant Co.*, 208 F. 2d 710 (C.A. 4; 1953) denying enforcement of the Board's order (104 N.L.R.B. 338); *N.L.R.B. v. Cleveland Trust Co.*, 214 F. 2d 95 (C.A. 6; 1954) denying enforcement of the Board's order (102 N.L.R.B. 1497); *Bonwit Teller, Inc. v. N.L.R.B.*, 197 F. 2d 640 (C.A. 2; 1952) cert. den. 345 U.S. 905 denying enforcement of the Board's order (96 N.L.R.B. 608); *N.L.R.B. v. The Newton Co.*, 236 F. 2d 438 (C.A. 5; 1956) denying enforcement in pertinent part of the Board's order (112 N.L.R.B. 465, 504-505).

In these cases the benefits granted were held not to so affect the employees as to interefere with, restrain or coerce them in the enjoyment and exercise of their rights under the Act notwithstanding they were in the form of wage increases and other substantial betterments and notwithstanding the employer had given lawful expression to his opposition to the union. The employees remained free and unfettered in the exercise of their rights under the Act in respect to self-organization, the evaluation of the union's organizational appeal, and the untrammelled expression of their wishes in a representation election.

The Board apparently pays no more than qualified and occasional lip service to the holdings in these cases. In the instant case it adopted without qualification and thereby approved the Examiner's invocation of the rule laid down in *American Freightways, Inc.*, 124 N.L.R.B. 146 (1959), that the employer's motive is neither controlling nor material. (R. 28).[7]

---

[7]The Board has made an artful and determined attempt in its brief to free itself of its holding in *American Freightways*. Significantly it has refrained from doing so as a matter of decision although it has been confronted with the question many times since.

It here argues that language in *American Freightways* "suggests that motive may be irrelevant". The language from that case quoted by the Examiner and adopted by the Board in the present case is, "It is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed". Noting the Board's holding in *American* rejecting the respondent's contention that it was not guilty of unlawful motivation the Examiner here held that "motive is neither controlling nor material" (R. 28).

The Board also argues that this "suggestion" in *American Freightways* was negated in "later decisions". The only "later" decision cited is in *True Temper Corp.*, 127 N.L.R.B. 839, decided by adoption of

In its brief (at pages 13-14) the Board argues that "under a strictly literal interpretation of Section 8(a)(1)" grants made for business considerations may "be said to 'interfere' with the employees' right of self-organization, at least to the extent that they obviate some of the conditions which originally impelled the employees to seek collective bargaining", that "if it is apparent to the employees that there is a legitimate business purpose for the employer's action, they are not likely to consider the benefits conferred as something which could only be gained and retained if there were no union" and finally, "even if a grant of benefits in these circumstances could be thought to restrain or coerce the employees, a privilege is accorded the employer to inflict this 'injury' in the interest of ac-

---

the Examiner's report on May 19, 1960, a few days more than one year *before* the decision in the present case.

The Board now states that the correct rule was set forth in its decision in *Hudson Hosiery Company*, 72 N.L.R.B. 1434, decided March 28, 1947. The Examiner in *American Freightways* relied on *Hudson* and the absence of unlawful motivation in finding that the respondent had not violated the Act (124 N.L.R.B. 146, 157) and he was reversed by the Board as above noted. In *Fetzer Television, Inc.*, 129 N.L.R.B. 660 (1960) the Examiner was the one who heard the *American* case. The Board adopted his report in Fetzer in which he referred to the Board's test in *American* and observed there was nothing in *True Temper* that altered or modified that test. (at page 668). In *Reliance Fuel Oil Corp.*, 129 N.L.R.B. 1166, 1175 (1961) the same Examiner applied the *American* doctrine again noting that *True Temper* had not changed it. The Board found it unnecessary to apply the *American* doctrine because of contemporaneous unfair labor practices but it did not repudiate it. In *Willard's Shop Rite Markets, Inc.* 132 N.L.R.B. 1146 (1961) the Examiner observed that *Hudson* and *American* appeared to be in conflict with each other, but the Board passed over the matter without comment much less a decision on the point. As late as April 10, 1963 the Board invoked the *American* doctrine in *Nickey Chevrolet Sales, Inc.*, 142 N.L.R.B. No. 4, 63-1 CCH N.L.R.B. ¶12,292. No case has been found in which the doctrine has been withdrawn or overruled by the Board.

commodating his legitimate interest in running his business. See *Republic Aviation Corp. v. National Labor Relations Board*, 324 U.S. 793, 798. But this immunity exists only if the employer acts for the purpose for which the privilege was given. Hence, where, as here, his motive is antiunion, the privilege will not protect him."

This explication of the Board's concept of the law demonstrates its patent unsoundness. First it assumes contrary to fact that the employees were engaged in their own effort to organize in order to obtain certain benefits instead of being importuned with promises by union organizers to join the union and give it the right to represent them in bargaining as was the case here. Next it proceeds and rests upon the false premise that opposition to a union is not "legitimate". It recognizes that the employer's motivation must be made apparent to the employees in order for the employer to qualify for the protection of the "privilege" referred to. This rules out the purely subjective test and concedes the objective test in agreement with the Court of Appeals. It also gives rise to questions concerning the source of the "privilege" and "immunity" upon which employers are said to be dependent and by whom and upon what terms and conditions the same are granted, withheld or withdrawn. Surely the Board lays no claim to such power or authority.

And finally the heart of the matter is reached in the answer to the remaining question, namely, upon whom is the "injury" inflicted when as here benefits are granted the employees permanently, unconditionally

and unattended by any unfair labor practices? Obviously it is not the employees who were injured because they gained desirable ends without surrendering or losing anything. The gains or benefits themselves were neither injurious nor unlawful. The Examiner and the Board were careful to provide that nothing in the order "shall be construed as requiring the respondent to vary or abandon any economic benefit or any term or condition of employment which it has heretofore established" (R. 32, 53-54). Had the vacation and overtime benefits involved been injurious to the employees the Board would have ordered the restoration of the status quo ante.

To grant improvements which may "obviate some of the conditions" which might impel employees to organize or designate a union to represent them certainly is neither injurious to the employees nor unlawful on that account. The law does not require employees to be organized and represented by a union before they can be given improvements in their benefits and working conditions.

Manifestly the "injury", if any, in this case was not to the employees, but to the union that was "seeking to organize the employees" (R. 32). Herein, respondent submits, lies the fundamental error of the Board. It has treated the union and the employees as being one and the same and synonomous in its interpretation and application of the Act. It has for all practical purposes sought to amend Section 8(a) (1) administratively so as to provide that it shall be an unfair labor practice and unlawful for an employer to inter-

fere with a union in its efforts to organize his employees. By its decisions it has undertaken to impose a rule as here that would require the employer to do nothing that would affect his employees beneficially because of its detraction from the union's organizing campaign by making the employees less receptive to being "sold" by the union. The union thereby becomes the end rather than a means to the end, and the employees whose rights Congress undertook to protect by the Act become subordinated and ignored. They are deprived of improvements in their working conditions and forced to mark time from the inception of the union's organizing efforts until the campaign is ended one way or another—in this case over 16 months later! The Board has gone even further in at least one case, *Willard's Shop Rite Markets*, 132 N.L.R.B. 1146, by holding that benefits granted in anticipation of an organizing effort not yet begun among the employer's employees were unlawful.

This interpretation of Section 8(a) (1) which makes the union the chief beneficiary under the Act accords with the Board's refusal to give effect to the free speech provisions of Section 8(c) in representation cases with the result that elections lost by unions are set aside because of lawful, protected free speech of the employers.[8]

[8]See *Dal-Tex Optical Company, Inc.*, 136 N.L.R.B. 1782, 1786-1787 (1962) in which it is stated that the duty of the Board is to "advance the statutory policy of *encouraging* the practice and procedure of collective bargaining" (emphasis added). The Board appears to provide this encouragement by favoring unions in its interpretation and administration of the Act in a manner that is not to be found in the Act and that was never intended by Congress.

The Board thereby restricts and abridges the exercise of effective, lawful, free speech of the employer and deprives the employees of the use and benefit of it in the interest of shielding and protecting the union from the effects thereof. Elections lost by the union are set aside by the Board assertedly because the lawful, protected free speech of the employer "interfered with" the employees in the exercise of their rights under the Act so that they were incapable of a free choice.

This is precisely what the Board said befell the employees in the present case because of the vacation and overtime benefits. The Board's concept of what constitutes interference under the Act is thus brought full circle.

The Board makes no effort to conceal its concern over the effect upon the union of the granting of employee benefits. It argues in effect that the union was unlawfully disadvantaged by the grant because of its inability to respond in kind. It further argues, substantially, that the grant is unlawful because the employees may be made less receptive to the union. Neither of these results is unlawful, and both arguments overlook the fact that the required withholding of benefits would not balance the scales. On the contrary it would disadvantage the employees, and give the union an unfair advantage in blocking improvements which it could then promise to obtain for the employees thereby inclining them to vote for the union. This may be and probably is the end that the Board believes should be accomplished, but the Act neither requires nor supports it.

The Board has erroneously concluded that the Court of Appeals held Section 8(c) encompasses the granting of economic benefits. The court interpreted and applied Section 8(a) (1). It pointed to Section 8(c) as evidencing the fact that expressed opposition to the union and the non-coercive efforts of the employer to persuade his employees that a union was not necessary or desirable, was not unlawful and did not constitute interference, restraint or coercion in violation of Section 8(a) (1). Just as promises of reward and threats of reprisal referred to in Section 8(c) are only two of many forms of prohibited interference, restraint and coercion, so also all conduct not protected expressly by Section 8(c) is not such as constitutes intereference, restraint or coercion. For example, benefits granted for business or other legitimate purposes are not embraced in Section 8(c) as such, but they are nonetheless lawful. Persuasion of employees not to join a union is not an illegitimate or unlawful purpose.

The court thus found that the granting of benefits permanently, unconditionally and unattended by unfair labor practices for the purpose of persuasion that a union was not necessary did not constitute unlawful intereference with restraint or coercion of employees under Section 8(a)(1) as read in the light of and consonant with the entire Act.

A host of cases that spell out interference, restraint and coercion in contravention of Section 8(a) (1) involve threats, promises, interrogation, surveillance, discrimination and other forms of pressure on em-

ployees that by allurement, punishment, fear and otherwise impairs or destroys the free exercise of their right to engage or refrain fom engaging in the activities protected by the Act.[9]

The present case "differs tellingly from the actions prohibited by this wide range of cases" (R. 127). It also differs from cases in which benefits were held out as promises for the future instead of being given outright, permanently and unconditionally regardless of the employees actions in respect to self-organization or collective bargaining.[10] Such promises are not protected by Section 8(c). They may constitute "allurements" that exert economic pressure rather than persuasion on the employees by placing them in the position of having to chose between the promised benefit and the exercise of their rights under the Act.

Cases of that character fall under the principle applied in cases in which benefits were granted in consideration of the repudiation of the union as in *Medo*, or coupled with threats as in *Crown Can*, or in return for an agreement to vote against the union.

In both type of cases,—the promise and the conditional grant, the interference results from "the squeeze in which the employees are placed".

The "allurements" in *Western Cartridge Co. v.*

[9] *Rapid Roller Co. v. N.L.R.B.*, 126 F 2d 452 (C.A. 7; 1942); *Collins Baking Co. v. N.L.R.B.*, 193 F. 2d 483 (C.A. 5; 1951); *N.L.R.B. v. Economy Furniture*, 284 F 2d 339 (C.A. 5; 1960); *N.L.R.B. v. Ferguson*, 257 F 2d 88 (C.A. 5; 1958) *N.L.R.B. v. Gate City Cotton Mills*, 167 F 2d 647 (C.A. 5; 1948)

[10] Compare, *N.L.R.B. v. Bailey Co.*, 180 F 2d 278 (C.A. 6; 1950); *Bailey Company*, 75 N.L.R.B. 941.

N.L.R.B., 134 F 2d 240 (C.A. 7, 1943) put "the squeeze" on the employees there, but that case and the one at bar are poles apart. In *Western* the company and a favored independent union were faced with organization by an outside union. The company urged employees to execute individual contracts which, at the instance of the independent union in order to bolster its declining membership, carried a 2% "wage bonus". In these and other coercive circumstances the court gave utterance to its oft quoted words that "interference is no less interference because it is accomplished through allurements rather than coercion". The court's statement continues, "where, as here, the system is employed to stem a tide of organization and is adopted as a means of eliminating outside unions as collective bargaining agents of the company's employees" (at page 244).

In the present case the employees were in no squeeze and under no economic pressure as the result of the benefits accorded them. The Board's argument concerning respondent's exercise of its economic power is wide of the mark insofar as the employees and their rights under the Act are concerned.

The record here shows that respondent granted benefits to its employees for each of several years prior to the union's determination to undertake an organizing effort. They were made unconditionally in 1959 and before as they were in 1960. In many instances they were more substantial than those here involved. They all flowed from identically the same economic power. It would not be unreasonable to infer that in

some degree the employees were caused thereby to feel they had no need of union representation and that, in part, such was the hope and purpose of respondent. Notwithstanding that effect and purpose the improvements were not unlawful.

The benefits here involved arose out of perfectly legitimate and unsuspicious circumstances that were reasonably related to the usual conduct of employee relations. They were not themselves unreasonable or suspect. The only new element was the union's determination to try to organize the employees and its campaign to that end. The Court of Appeals was correct in holding that under the Act this did not give rise to the requirement that the employees be deprived of the benefits that were accorded them in the circumstances here present. Informing the employees of such benefits along with all of the other benefits likewise was not unlawful.

An improvement in working conditions during an election period is not an unfair labor practice where, as here, there is no suggestion that such benefits would be withdrawn if the union were successful. *Peter J. Schweitzer, Inc. v. N.L.R.B.*, 144 F 2d 520 (C.A. D.C.; 1944). If that were not true it "would mean that it is the duty of an employer to refrain from benefiting his employees in order to make them more inclined to vote for a union." (144 F 2d 520, 524)

The minimizing of the influence of organized bargaining stemming from the employer's unilateral action in *May Department Stores Co. v. N.L.R.B.*, 326 U.S. 376, 90 L ed 145 (1945) is a far cry from the pre-

sent case. There the employees were represented for purposes of collective bargaining and the employer went ahead with wage adjustments without negotiating with the bargaining agent. It was this conduct that the court said "minimizes the influence of organized bargaining" and interferes with the right of self-organization "by emphasizing to the employees that there is no necessity for a collective bargaining agent" (90 L ed 145, 154).

Summarizing, the benefits in the present case "carried no coercive element; they were not conditional upon the employees' relinquishment of any rights." (R. 128) There was no suggestion that they would be withdrawn if the union were successful or that respondent would deal more favorably with the employees if they defeated the union. There were no attendant unfair labor practices. "The employees had, as the Act intended the employees to have, an unfettered right of self-organization, a free choice" (R. 128).

Conclusion

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully Submitted,

JEAN ALLARD
Chicago, Illinois

HAROLD E. MUELLER

KARL H. MUELLER
Fort Worth, Texas
Attorneys for Respondent

JEAN ALLARD
Maremont Corporation
168 North Michigan Ave.
Chicago 1, Illinois

MUELLER & MUELLER
Burk Burnett Building
Fort Worth, Texas
Of Counsel